PretiFlaherty

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February 17, 2005

Andrew Fisk, Director
Bureau of Land and Water Quality
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

RE: Comments on the Androscoggin River Total Maximum Daily Load, Gulf Island Pond and Livermore Falls Impoundment Draft Dated December 2004

Dear Mr. Fisk:

The Androscoggin River Total Maximum Daily Load, Gulf Island Pond and Livermore Falls Impoundment Draft dated December 2004 contains legal and process errors which must be corrected before the plan is finalized. These concerns relate to two areas of the Draft – (1) the inclusion of the Livermore Falls Impoundment and (2) the waste load allocation requirements. In addition, there are concerns about the adequacy of the public participation process for the development of the chlorophyll-a concentrations. These concerns are addressed in section 3 of this letter.

1. Inclusion of the Livermore Falls Impoundment. Under the provisions of the Clean Water Act, it is clear that Total Maximum Daily Loads ("TMDL") are created for waters that appear on the State's 303(d) list. See 40 C.F.R. §130.5(d)(3); 40 C.F.R. §130.7; Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992 (May 20, 2002) ("The TMDL submittal should identify the waterbody as it appears on the State's/Tribe's 303(d) list."); Guidance for Water Quality-Based Decisions: The TMDL Process ("Section 303(d) of the Act...requires States to identify waters that do not or are not expected to meet applicable water quality standards with technology based controls alone. Waters impacted by thermal discharges are also to be identified. States are required to establish a priority ranking for these waters, taking into account the pollution severity and designated uses of the waters. Once identification and priority ranking of water-quality waters are completed, States are to develop TMDLs at a level necessary to achieve the applicable water quality standards."). This is consistent with the basic construct of the Act which requires, as the first step, the identification and prioritization of impaired waters. This is a process that requires public participation. The next step is the development of the TMDL, again with public participation.

The Livermore Falls Impoundment is not included on Maine's 303(d) list. The Department has no authority to omit the 303(d) (or 305) list process. Thus, the Department must remove the Livermore Falls Impoundment from the Draft TMDL.

Further, the EPA requires a "full and meaningful" public participation in the TMDL process (Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992; 40 C.F.R. §130.7). This public participation process is fatally tainted for the Livermore Falls Impoundment since there has been no public process on the listing or designation of the waterbody.

2. Waste Load Allocation (WLA) Requirements. EPA guidance and regulations require that the TMDL include "WLAs which identify the portion of the loading capacity allocated to individual existing and future point source(s)" (Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992; 40 C.F.R. §130.2(h); 40 C.F.R. §130.2(i); Guidance for Water Quality-Based Decisions: The TMDL Process). Guidance documents further state: "Where a TMDL has been approved, NPDES permits must contain effluent limits and conditions consistent with the requirements and assumptions of the wasteload allocations in the TMDL." EPA Memorandum – Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs – Nov. 22, 2002; see also 40 C.F.R. §122.44(d)(1)(vii)(B). Thus, the TMDL must include specific WLAs and these allocations form the basis for the subsequent NPDES permits. Indeed, without a specific WLA scheme adopted, neither EPA nor the public can have any confidence that the TMDL will achieve the goal of a water segment that attains its classification. Thus, the TMDL must adopt specific WLAs for each source. Further, as the Draft has determined the WLA using the default allocation method, the final TMDL must specify in all appropriate sections that the pollutant allocations presented are the default waste allocations.

3. Chlorophyll-a Concentrations. The Department's concerns regarding phosphorus (chlorophyll-a) and algal blooms appear to be evolving. The concern is that this evolution has not incorporated the required public information and participation as the Department has moved through the 303(d) process and then the TMDL process

"EPA's policy is that there should be full and meaningful public participation in the TMDL development process." (EPA Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992, Section 11, emphasis added). The TMDL process is based on the 303(d) listing process which requires public participation in the identification of impaired segments and the impaired uses and causes of the impairment.

The State of Maine's 2002 Integrated Water Quality Monitoring and Assessment Report (the Clean Water Act's 305(b) report and 303(d) list [the "Report"]) identifies the main stem of the Androscoggin River from the Gulf Island Dam to 4 miles upstream as impaired. The uses identified as impaired are aquatic life and recreation. The causes are identified as: (1) dissolved oxygen; (2) transparency; and (3) nutrients. This Report also contains a table that identifies "the designated use categories and the criteria (with references) used to assess attainment of the use." (Report, p. A-15.) The Report identifies among the criteria for attainment of aquatic life uses dissolved oxygen. The Report identifies the following criteria for attainment of recreational uses: E. coli bacteria; water color and general provisions, including floating/settleable solids, pH, and radioactive substances. This was the information the public was afforded the

opportunity to comment upon. It did not provide the public with a meaningful opportunity to comment on algae blooms as a cause of the impairment of the use of designated water contact recreation.

The Draft TMDL identifies algae blooms resulting from phosphorus discharges to the river as the reason that the river segment is prevented from attaining the designated use of water contact recreation. Perhaps more significantly, the Draft TMDL apparently assumes that to support a designated use of primary water contact recreation (swimming),[1] the water body must be free of algal blooms and implements numeric criteria to achieve that result. (See DEP Memorandum Chlorophyll-a Number used in the Androscoggin Model.) EPA requires that all affected parties have adequate opportunity to participate fully in the development of a numeric criteria, and that if such implementing procedure or derived numeric standard is to be used in developing TMDLs or setting limits in NPDES permits that it must be formally adopted. The Department, however, has not afforded the public meaningful opportunity to participate in the development of the chlorophyll-a number used in the TMDL, or even the threshold determination of the extent or level of algal bloom necessary for a waterbody to fail to attain the designated use of water contact recreation. Thus, the TMDL process has not complied with the public participation requirements for chlorophyll-a (phosphorus).

MeadWestvaco has participated in the Androscoggin TMDL process in a collaborative manner and intends to continue in that manner; however, in doing so, the Company is not waiving its continuing objections to these process deficiencies.

4. Conclusion. In conclusion, the applicable regulations prevent the Livermore Falls Impoundment from being included in the TMDL and require the adoption of WLAs as the default waste load allocations.

Sincerely,

Virginia C. Davis

Virginia E. Davis

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[1] There is no question that swimming is seasonal in Maine. Thus, attainment efforts must be targeted to the swimming season.